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# BOOK REVIEWS

T. W. Bennett, *Customary Law in South Africa*, Lansdowne: Juta and Company Ltd., ISBN 0-7021-6361-9, 462 pp.

The advent of colonialism spelt bad news for indigenous customs and laws. The imposition of colonial administrative structures and institutions resulted in the subjugation of peoples and the subordination of indigenous institutions, customs and laws. Relying on an ethnocentric and racist conception of law and society, the colonizers showed total disrespect for "primitive" local legal systems which had evolved for years, supplanting them and replacing them with "modern" Western legal systems.

In the case of South Africa, years of subjugation and non-recognition were brought to an end by the coming into force of the new constitutional dispensation in 1993. The new Constitution not only gave recognition to customary law but accorded it the same status as the imported Roman-Dutch and common law.[1]

As the title of the book suggests, Bennett's book deals with customary law in South Africa. It offers an exploratory but at the same time critical exposition of customary law and its relationship to the Constitution, statutory law as well as the common law. Divided into 13 chapters, the book explores a diverse number of salient issues which range from succession law to marriage law.

The first chapter is introductory and deals with basic concepts and theories relating to the nature of customary law. It traces the development of various anthropological as well as legal perspectives which have impacted on the recognition or non-recognition of customary law. These perspectives include evolutionism, structural-functionalism, Marxism, legal pluralism and gender studies.

In the next chapter, Bennett grapples with recognition, ascertainment and application of customary law. He traces the history of recognition from the earliest colonial settler administration in 1652, through the apartheid era to the adoption of the new multiracial Constitution. In this regard, he notes that "customary law is [now] a core element of the South African legal system, on a par with Roman-Dutch law".[2] Since the courts now have discretion to apply customary law, the chapter is also devoted to a detailed discussion of the relevant choice of law rules.

Since customary law is part of indigenous culture, chapter three is devoted to a discussion of culture as a right both under the South African Constitution as well as under international law. Section four is the most notable part of this chapter. It deals with the legislative reform of customary law. Bennett observes that "customary law has long been criticised for gender and age discrimination."[3] Consequently, the South African Law Commission has been mandated with the task of reviewing various elements of customary law that do not comport well with the Constitution as well as international law.

[1] S. 211(3) of the South African Constitution. See *Akiklso S* v. *Makwanyane & another* 1995 SA 391 (CC); 1995 (6) B.C.L.R. 665 (CC) paras. 365–383.
[2] Bennett, 2004, p. 43.
[3] Bennett, 2004, p. 97.

The next three chapters are dedicated to the arbiters of customary law, namely traditional leaders and the courts and their procedure. Chapter four focuses on traditional rulers and maps out their status and functions under the Constitution. The chapter is a succinct, if somewhat brief, exposition of the traditional rulers' legislative, judicial, and executive functions. Bennett makes it clear that whilst the powers of traditional leaders are sourced from tradition, their exercise is now regulated by the Constitution.[4] Chapter five begins with a brief history of the colonial court system and the status of the customary court within those arrangements. The chapter then examines the functions and status of these courts under the new Constitution. In this regard, Bennett notes that the express constitutional retention of customary courts[5] is recognition of their "low cost, simplicity, geographic proximity ... and familiar procedures".[6] Chapter six discusses procedural matters and tackles wide-ranging issues such as fees, recusal, evidentiary rules, representation and others.

Chapters seven to eleven deal with matters related to family law. Chapter seven is intended to serve as background to the subsequent four chapters which deal with "domestic relationships".[7] It therefore focuses on the family and discusses the various types: nuclear, extended, modern, and so on. Chapters eight to ten elaborate on the customary law relating to formation of marriage, the consequences of the union as well as dissolution. The analysis tackles various constitutional issues as well as efforts at law reform in this area by the South African Law Commission. Chapter eleven focuses on the customary law relating to children. It discusses matters such as conceptions of childhood, legal personality, legitimacy and affiliation, adoption and foster care, capacity as well as issues relating to discipline. Again, Bennett tackles and suggests solutions to problems that may arise in cases of conflict between customary law and the Constitution as well as international law.

In chapter twelve, Bennett discusses the customary law applicable to succession. The issues covered include rules of succession, wills, administration of estates as well as law reform. Under law reform, Bennett discusses various constitutional issues that mandate law reform in this area of customary law. In particular, Bennett criticizes the infamous decision in *Mthembu* v. *Letsela*[8] and suggests that the Court overlooked many factors that an analysis of unfair discrimination should have taken into account. He argues that the Court should have asked "whether customary-law differentiation on the basis of gender and legitimacy was compatible with human dignity, which is the principle feature underlying the right to equality".[9] More importantly, Bennett notes that the Court paid no attention to the best interests principle which must inform all matters relating to children's rights. In this regard, one may only hope that efforts by the South African Law Commission in reforming this area of law will incorporate all the relevant constitutional as well as international law principles.

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[4] Bennett, 2004, p. 127.
[5] See s. 16(1) of Schedule 6 of Act 108 of 1996.
[6] Bennett, 2004, p. 142.
[7] Bennett, 2004, p. 178.
[8] 2000 (3) SA 867 (SCA).
[9] Bennett, 2004, p. 361.

The final chapter deals with the customary law relating to land tenure and considers issues such as customary tenure, transfer of rights, conflict of laws and reforms under the Constitution. As in the rest of the book, the chapter adopts a comparative outlook: between customary law and common law as well as the customary law of other jurisdictions. A considerable portion of the chapter is devoted to constitutionally sanctioned land law reform which is aimed at remedying years of racially motivated land policies. In this regard customary land law may come into prominence once more as persons or communities that had had their land disposed of under apartheid laws regain their proprietary entitlements.

In conclusion, Bennett's book deals with various issues relating to customary law in a succinct and scholarly manner. It should prove a good starting point for researchers in the areas considered. It is also useful for law students and those interested in the development of customary law.

C. Grant Bowman and A. Kuenyahia, *Women and Law in sub-Saharan Africa*, Accra, Sedco Publishing Ltd., ISBN 9-9647-2235-4, 652pp., £29.95. Available from Africa Books Collective, Oxford.

This book is a collection of excerpts dealing with various aspects of women and law in sub-Saharan Africa. The material is arranged into eight chapters, dealing with family law, women's access to land, inheritance law, women and reproduction, sexual violence against women, domestic violence, employment discrimination and women in politics. The strength of the book lies in the fact that each chapter draws from wide-ranging perspectives and jurisdictions across Africa. For example, chapter three, which deals with women and inheritance law, proffers material and perspectives from Nigeria, Zambia, Tanzania, Kenya, Zimbabwe and Ghana, as well as discussions of mechanisms under the African regional human rights system. This eclectic format is reflected in the rest of the chapters.

The diversity of the sources of the material is also mirrored by the type of material as well as analysis, and includes statutes, court judgments and academic commentary. This multiplicity of sources and perspectives serves to highlight the intersectionality of legal issues that affect women and other dynamics that are operative within their communities, such as religion, culture, structure of legal systems, and politics, to name but a few. It demonstrates the many and often multi-faceted approaches relating to issues in women and law in Africa. Furthermore, the arrangement of the material allows for a comparative overview of the legal issues, difficulties, analyses and solutions that affect women. The book should, therefore, prove an excellent teaching resource in the area of women and law in Africa and should be of relevance not only to those studying law but also anthropology, sociology, area studies or gender studies.

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Martha S. Tumnde, *Motor Vehicle Insurance in Cameroon*, Njikam Design House, Limbe, Cameroon, 2003, xxxi + 265 pp. + appendices, ISBN 9956-26-024-x.

In 1916 France and the United Kingdom divided the former German colony of Cameroon into two parts and, as the author explains, this officially marked the beginning of "the duality of Western legal systems which the people of Cameroon have since experienced and to which they remain subject to this day".

Most of West Africa was colonized by the French and British although not by the dual control method seen in Cameroon. In Cameroon French law was applied to that part under French control and English law dominated the British territory. In 1961 the two territories re-united to form the Federal Republic of Cameroon under which each territory (now federated state) maintained its system of law. In 1972 the United Republic of Cameroon came into being without abolishing the dual systems of law.

The present book explains this background and the evolution of Cameroon insurance law in Chapter 1. The chapter finishes with an explanation and introduction of what then becomes the heart of the book, namely CIMA. This refers to La Conference Interafricaine des Marches d'Assurances, which in 1992 created an integrated organization of insurance markets. The 14 member states of this organization are French-speaking former colonies of Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Ivory Coast, Congo-Brazzaville, Gabon, Mali, Niger, Senegal, Togo, Equatorial Guinea and the Comoros Islands. CIMA produced a Code (1995), the purpose of which was to provide a supranational organization with authority to execute measures and issue binding decisions which individual states would not necessarily have the assets and motivation to carry out. The Code has two main bodies of rules. One regulates the insurance contract while the other applies to the conduct of insurance companies. It is clear from the wording of the various sections set out in the text that advantage has been taken of using reforms seen in both French and (to a much lesser extent English) insurance law and supervision in recent years. However the author stresses that an effort has been made to tailor the Code to what is seen as prevailing local conditions and realities. The Code had only been published in French at the time of writing the book.

The book has 11 chapters. Seven chapters are concerned with core principles of insurance law: Chapter 3 (Formation of the Contract of Motor Insurance); Chapter 5 (Insurable Interest); Chapter 6 (Principle of Utmost Good Faith); Chapter 7 (Insurance Intermediaries); Chapter 8 (Compulsory Motor Insurance); Chapter 9 (The Principle of Indemnity); and Chapter 10 (Settlement of Motor Vehicle Insurance Claims). The remaining chapters provide the relevant background to the subject of motor insurance law and help to give a comprehensive picture of the state of the motor insurance market in Cameroon.

One criticism would be that many references to English insurance law are either outdated or not up to date. Thus reference to the Insurance Brokers (Registration) Act, 1977 (wrongly referred to as the Insurance Brokers (Intermediaries) Act) makes no reference to the fact that the Act was repealed by the Financial Services and Markets Act, 2000. This 2000 Act is not mentioned at all when one might have expected, as part of the comparative approach that runs throughout most of the book. It would have deserved inclusion in

Chapter 11 entitled Government Control and Supervision of Insurance Companies. Similarly, in a book devoted to motor insurance, reference should be made to the 1988 Road Traffic Act and not the 1972 Act. Important changes to road traffic insurance have been brought about by a raft of EU directives none of which receive mention. Some occurred after the date of this publication but there are those that appeared earlier and could have been usefully included.

Chapter 6 deals with the Good Faith requirement in insurance law. There is to be found in this topic a considerable divergence between English and French law, with the latter providing a considerably more pro-insured stance. Cameroon law follows French law (see pp. 98–105). However the House of Lords decisions in *Pan Atlantic* v. *Pine Top* (1994) and *The Star Sea* (2001), which in their own ways made some inroad into the harshness of English law, receive no mention. Despite these inroads, this reviewer heartily agrees with the author when it is stated that "if there is any area of the Common Law where English case law must be adopted sparingly, that area is the law of insurance". That general view is expressed in Chapter 7 dealing with insurance intermediaries. Here it is pointed out that in English-speaking Cameroon the English cases that allow insurers to off-load their responsibility for the defaults of their agents onto the shoulders of the unsuspecting customer are (unfortunately) followed. The author stresses that in consumer motor insurance many insured are poorly educated, and even if educated then the product itself is not easy to comprehend and may well be sold by those who are commission driven rather than providing the customer with the technical help that they often need.

Chapter 8 deals with compulsory motor insurance in detail and provides a comprehensive review of the Motor Insurance Fund that provides similar cover to the work of the Motor Insurers Bureau in the United Kingdom. Facts and figures provide a glimpse of the importance of the fund, but only up to 1986.

Chapter 10 is concerned with the settlement of claims. This is an interesting chapter and compares the no-fault/fault arguments. Cameroon has decided to go along with the French no-fault approach. What is especially interesting to those familiar with the costs and delays of English motor insurance law, despite the Woolf reforms, is that CIMA Code has brought about massive improvements in this area, reducing the average period of settlement in one set of examples from 41 months down to 6 months. The chapter also provides interesting details of how the no-fault system works in the allocation of damages under the various headings. As the author explains, this new approach with its streamlining and use of scales, table and ceilings has warded off the excessive awards of damages that threatened the survival of insurance companies.

The author concludes that the introduction of the CIMA Code has done much to provide economic co-operation and integration and stability in insurance in the geographical region covered by CIMA.

The declared aim of this book "is to promote insurance knowledge and general awareness in our community of motor vehicle insurance." That aim has been achieved. This is an interesting and well-written book (and well produced by the publishers). The, at times, strange time warps mentioned above can easily be dealt with in a later edition.

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